Supreme Court, U.S.
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No. 93-2094

In The

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF:
DONALD MARK GARRINGER

DONALD MARK GARRINGER,

Petitioner,

v.

INDIANA SUPREME COURT
DISCIPLINARY COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petitioner's First Amendment claims were raised in the court below.

2. Whether the petitioner's First Amendment claims present a substantial federal question.

3. Whether the petitioner's other federal claims were properly presented to the court below so as to make those claims appropriate for a grant of certiorari.

4. Whether the petitioner's due process claims present a substantial federal question.

LIST OF PARTIES

The proper respondent to the Petition for Writ of Certiorari should be:

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Commission
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(317) 232-1807

Pursuant to Indiana Rule of Admission and Discipline 23, §11(e), disciplinary complaints against attorneys are to be filed by the Indiana Supreme Court Disciplinary Commission.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Indiana Supreme Court Disciplinary Commission respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Indiana Supreme Court's opinion in this case. That opinion is reported at 626 N.E.2d 809 (Ind. 1994).

JURISDICTION OF THE SUPREME COURT

As more fully set out under the Reasons for Denying the Petition, the Supreme Court lacks jurisdiction to review the decision below as to those claims that were not properly raised in the proceeding before the Indiana Supreme Court.

ADDITIONAL RULES INVOLVED

Indiana Rule of Professional Conduct (Prof.Cond.R.) 8.2(a) states:

> A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Ind.Prof.Cond.R. 8.4(d) states:

> It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.

STATEMENT OF THE CASE

The respondent refers the Court to the factual statement contained in the opinion of the Indiana Supreme Court below for an objective statement of the facts of this case.

REASONS FOR DENYING THE PETITION

I. Petitioner's First Amendment Claims Were Not Raised Below

This lawyer disciplinary proceeding was initially tried to a hearing officer appointed by the Indiana Supreme Court, who issued his recommended findings of fact and conclusions of law on November 7, 1992. The petitioner did not raise claims under the First Amendment before the hearing officer, and the hearing officer did not include within his recommended findings of fact and conclusions of law any discussion of claims under the First Amendment.

Section 15(a) of Rule 23 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys (Admis.Disc.R.), governing lawyer discipline proceedings, states as follows:

> The respondent or Commission shall have thirty [30] days after the filing of the hearing officer's finding and recommendation to petition for a review of the same before the Supreme Court. If no petition for review is filed within thirty [30] days of the finding and recommendation of the hearing officer the Supreme Court shall enter judgment or such other appropriate order in the premises.

On May 4, 1993, the petitioner filed a petition for review of the hearing officer's findings and conclusions and an accompanying brief, pursuant to Ind.Admis.Disc.R.

23, §15(a).[1] There were nine specifications of error in his brief; however, none of them raised any claim under the First Amendment.

The Indiana Supreme Court rendered its final judgment on January 10, 1994. *In the Matter of Donald Mark Garringer*, 626 N.E.2d 809 (Ind. 1994). In the opinion below, the Indiana Supreme Court did not raise or decide any claims under the First Amendment on its own.

Thereafter, on January 27, 1994, the petitioner filed a Petition for Application for Rehearing, in which he raised certain issues for reconsideration. However, the petitioner did not mention any claims he had under the First Amendment in his Petition for Application for Rehearing.

On March 15, 1994, the Indiana Supreme Court denied the petitioner's Petition for Application for Rehearing without addressing the merits of any of the claims raised therein or any claims under the First Amendment. Appendix to Petition for Writ of Certiorari at App.1.

The petitioner did not raise his First Amendment claims before the Indiana Supreme Court and they were not decided by that court. He is attempting to raise his First Amendment claims in this Court for the first time. Accordingly, any claims under the First Amendment were

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[1] Neither the petitioner nor the respondent were notified of the filing of the hearing officer's recommended findings of fact and conclusions of law. Accordingly, the respondent did not then object, and does not now object, to the untimeliness of the petitioner's petition for review.

not properly preserved for review by this Court. 28 U.S.C. §1257(a); *Cardinale v. Louisiana*, 394 U.S. 437 (1969).

To the extent the petitioner is seeking review of the Indiana Supreme Court's interpretation of Ind.Prof.Cond.R. 8.2(a) and 8.4(d), no substantial federal question is presented for review by this Court. The Indiana Rules of Professional Conduct are promulgated by the Indiana Supreme Court in furtherance of its exclusive jurisdiction over the regulation of the practice of law in the State of Indiana. Absent a timely and properly raised question arising under the Constitution of the United States, the application and interpretation of those rules are purely questions of state law, over which this Court has no review jurisdiction. 28 U.S.C. §1257(a).

II. Petitioner's First Amendment Claim Does Not Present A Substantial Federal Question

Even if properly raised, the petitioner's claim under the First Amendment does not raise a substantial federal question. In her concurring opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 2748 (1991), Justice O'Connor joined in a portion of the Chief Justice's dissent, thereby creating a majority of the Court in support of the view that:

> Lawyers are officers of the courts and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. This does not mean, of course, that lawyers

> forfeit their First Amendment rights, only that a less demanding standard applies.

Id., 111 S.Ct. at 2748 (O'Connor, J., concurring).

The petitioner has pointed out no cases from the federal circuits or state courts of last resort that frame a significant division of authority concerning the federal constitutional limits to the words lawyers may use to attack the integrity of judicial officers. Indeed, the weight of authority is in support of the position of the Indiana Supreme Court that a lawyer may be properly subjected to disciplinary sanctions for making a statement impugning the integrity of a judge in reckless disregard for its truth or falsity. These cases have held that it does not violate the First Amendment rights of attorneys to hold them to an objective standard for evaluating whether a statement impugning the integrity of a judicial official is made with reckless disregard for its truth or falsity. *United States District Court v. Sandlin*, 12 F.3d 861 (9th Cir. 1993); *Standing Committee on Discipline v. Yagman*, 1994 WL 230338 (C.D.Cal. May 18, 1994); *Matter of Westfall*, 808 S.W.2d 829, 838 (Mo. 1990) *cert. denied*, 112 S.Ct. 648 (1991); *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (Minn. 1990), *cert. denied*, 498 U.S. 820 (1990). See also, *In the Matter of Holtzman*, 78 N.Y.2d 184, 573 N.Y.S.2d 39, 577 N.E.2d 30 (1991), *cert. denied*, 112 S.Ct. 648 (1991); *Ramirez v. State Bar of California*, 28 Cal. 3d 402, 169 Cal.Rptr. 206, 619 P.2d 399 (1980). That is, whether an attorney has acted recklessly is to be measured by "what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances." *Graham*, 453 N.W.2d at 322.

In the case below, the Indiana Supreme Court clearly held that the petitioner made statements that impugned the integrity of certain judicial officials without any support for those statements.

> Respondent failed to show that he had actual knowledge of such wrongdoing on the part of the named judicial officials, as evidenced by the content of his open statement. Respondent only had vague and unsubstantiated proclamations of wrongdoing without a single specificity.

626 N.E.2d at 812. Accordingly, the petitioner has failed to demonstrate that this case presents a substantial federal question under the First Amendment that would warrant granting the petition for writ of certiorari.

III. Petitioner's Other Claims Were Not Properly Preserved For Review By This Court

Ind.Admis.Disc.R. 23, §15(c) provides:

> In the event a party does not concur in a factual finding made by the hearing officer and asserts error in such finding in the petition for review, such party shall file with the petition for review a record of all the evidence before the hearing officer relating to this factual issue.

The petitioner filed no portion of the transcript of evidence along with his petition for review to the Indiana Supreme Court or at any other time.

In order to be properly preserved for review by this Court, a federal question must be developed in the courts below in accordance with the manner specified in the

applicable rules of practice in the lower court. *Beck v. Washington*, 369 U.S. 541, 549-54 (1962).

Many of the issues presented for review by the petitioner include intermingled questions of law and fact. "This Court has a duty to examine the evidence to see whether it furnishes a rational basis for the characterization put on it by the lower court." Petition for Writ of Certiorari at 17. The petitioner did not raise his claims in the Indiana Supreme Court in the context of a fully presented record. In the absence of the federal claims having been fully presented on a complete record in the court below, this case is not a proper one for review by this Court on a petition for writ of certiorari. The scarce resources of this Court should not be squandered upon a case that presents little more than a request for review of the factual record below.

IV. The Petition Does Not Raise A Substantial Question That The Underlying Proceeding Deprived The Petitioner Of His Rights To Due Process Of Law

In the underlying proceeding, the petitioner was charged with and found to have violated the Indiana Rules of Professional Conduct governing statements concerning judicial officials and actions that are prejudicial to the administration of justice. Ind.Prof.Cond.R. 8.2(a) and 8.4(d). The Indiana Supreme Court determined that the petitioner violated these rules by making statements concerning certain federal judicial officials with reckless disregard for their truth or falsity in publishing a statement that "described a far-reaching conspiracy involving

judges, bankruptcy trustees, United States Attorneys, and other federal court officials, allegedly devised to illegally convert assets properly belonging to the bankrupt estates." 626 N.E.2d at 811. The court below went on to find that:

> Respondent failed to show that he had actual knowledge of such wrongdoing on the part of the named judicial officials, as evidenced by the content of his open statement. Respondent only had vague and unsubstantiated proclamations of wrongdoing without a single specificity. This Court will not retry the Wade bankruptcy or Respondent's broad allegations of malfeasance therein. Suffice it to say that we are unaware of an iota of reliable evidence supporting Respondent's assertions of judicial misconduct such as to remove them from the realm of mere speculation and conjecture.

Id., at 812.

The petitioner is making one more effort to find a forum to retry his claims that certain assets in the Wade bankruptcy were stolen. He is attempting to turn this Court into such a forum under the guise of a claim that the underlying proceeding violated his due process rights. The case below established that at the time he issued his Open Letter calling into the question the integrity of certain federal judicial officials, he had no factual basis for making those claims. Because the Indiana Supreme Court failed to provide him with a mechanism for attempting the creation of a *post hoc* justification of his reckless claims, the petitioner now claims a violation of his right to be heard.

The person with the most intimate knowledge of the facts known to the petitioner at the time he made the statements in question is the petitioner himself. He can hardly now contend that he has been deprived of his due process rights by being denied the use of the disciplinary proceeding as a vehicle for attempting to prove for the first time the truthfulness of statements that were reckless when made.

The petitioner was not deprived of an opportunity to cross-examine the witnesses who testified against him, nor was he deprived of an opportunity to present evidence in his own defense. He was merely deprived of the use of this lawyer discipline proceeding as a vehicle to fish for facts that he should have had in hand at the time he published his reckless Open Letter. The test under *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) requires only that an opportunity to be heard be "meaningful." In this case, the issues focused upon the petitioner's state of knowledge of facts relating to the integrity of the federal judicial officials at the time he made his statement. None of the procedural restrictions now questioned by the petitioner in any way affected his ability to show at trial his state of knowledge at the time he made his statement. They only deprived him of the opportunity to attempt the creation of a *post hoc* justification of those statements.

The Indiana Supreme Court noted below that it would not provide the petitioner with a forum for attempting to relitigate issues that should have been presented in the course of the Wade bankruptcy proceeding. Indeed, the petitioner's attempt to use his lawyer discipline proceeding as a forum for relitigating Wade bankruptcy issues is not his first unsuccessful effort to use

collateral actions to constantly relitigate these issues. See *Wade v. Hopper*, 993 F.2d 1246 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 193 (1993) (petitioner was counsel of record for the Wades); *Matter of Wade*, 991 F.2d 402 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 195 (1993) (petitioner was counsel of record for the Wades); *Wade v. Indiana Supreme Court Disciplinary Commission*, *cert. denied*, 113 S.Ct. 468 (1992) (petitioner was counsel of record for the Wades); *Garrinnger v. Daniels and Lundberg*, No. IP-1710-C (S.D.Ind. May 21, 1993), *appeal docketed*, No. 93-3783 (7th Cir. Nov. 23, 1993).

The case below is also not the first occasion upon which the petitioner has resorted to impugning the integrity of judicial officials in connection with legal proceedings relating to the Wade bankruptcy. See *Wade v. Hopper*, No. 91-3892, slip op. at 4-5 (7th Cir. June 17, 1993), *cert. denied*, 114 S.Ct. 313 (1993) (petitioner's name stricken from the roll of attorneys in the Seventh Circuit for having "repeatedly filed briefs full of immaterial, impertinent and scandalous matter, attacked the integrity of members of the court [of appeals], and failed to exercise competent professional judgment.")

Petitioner has not raised a substantial federal question under the Due Process Clause of the Fourteenth Amendment, where his due process claim amounts to nothing more than a complaint that he has been deprived of yet one more forum for litigating claims that were more properly presented and resolved in the original Wade bankruptcy proceeding.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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